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BY: km

UNITED STATES DISTRICT COURT  
Middle District of North Carolina

JASON GLENN WINECOFF,

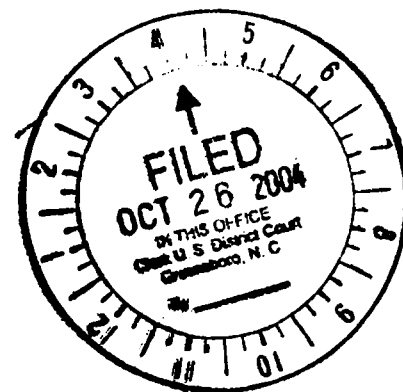
Petitioner,

v.

JAMES B. FRENCH, Admin.,  
Lanesboro Correctional Inst.,

Respondent.

1:04CV00703



**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the court on Respondent's motion to dismiss on statute of limitations grounds (docket no. 4). Petitioner has responded in opposition to the motion (docket no. 8). In this posture, the matter is ripe for disposition.

**I. Background**

Petitioner is a state court prisoner serving two consecutive sentences of 96-125 months and 204-254 months in the North Carolina Department of Corrections on convictions of robbery with a dangerous weapon and attempted first-degree murder. Petitioner pled guilty to these charges in the Superior Court of Cabarrus County on April 25, 1995, James C. Davis, Judge Presiding. Petitioner was represented by James C. Johnson and did not appeal.

After his conviction, Petitioner filed several motions in the state courts. Petitioner filed a Motion for Appropriate Relief (MAR) on October 23, 2003, which

was denied on October 31, 2003. Petitioner filed a petition for discretionary relief on March 18, 2004, which was denied on April 7, 2004. Petitioner filed a second MAR on February 24, 2004, which was denied on March 12, 2004. On August 9, 2004, Petitioner's pro-se federal habeas petition was filed.

In his federal habeas petition, Petitioner generally claims that his convictions are infirm because: 1) his plea of guilty was unlawfully induced or not made voluntarily with an understanding of the nature of the charge and the consequences of the plea; and 2) he was denied effective assistance of counsel (docket no. 2). Respondent argues that this federal petition was filed outside the statute of limitations set out in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Title 28 U.S.C. § 2244(d)(1). Brief, pp. 2–10 (docket no. 5). Because I believe that Respondent is correct, I will address only the statute of limitations issue.

## **II. Discussion**

Under the AEDPA, a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court must be filed in the federal court within one year of the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or  
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The one-year limitations period is tolled while a properly filed state post-conviction proceeding is pending, see 28 U.S.C. 2244(d)(2); and can be tolled to ensure equity in the “rare instances where — due to circumstances external to the party’s own conduct — it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Harris v. Hutchinson*, 209 F.3d 325, 330 (4<sup>th</sup> Cir. 2000); see also *Spencer v. Sutton*, 239 F.3d 626 (4<sup>th</sup> Cir. 2001). Nevertheless, subsequent motions or petitions cannot revive a period of limitation that has already run. See *Minter v. Beck*, 230 F.3d 663 (4<sup>th</sup> Cir. 2000) (federal habeas claim was time-barred because “more than one year had otherwise elapsed from April 24, 1996, until [the petitioner] filed his § 2254 petition”).

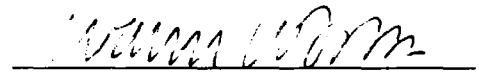
Petitioner’s conviction was final no later than 10 days after he pled guilty on April 25, 1995. See N.C.R. APP. P., Rule 4 (a) (10 days to file notice of appeal amended to allow 14 days effective October 31, 2001). Because Petitioner did not file a notice of appeal within the required time period, however, his conviction became final on April 25, 1995.

Because his conviction preceded the April 24, 1996, adoption of the AEDPA, Petitioner had one year from that time, until April 24, 1997, to file his federal habeas petition under the AEDPA's period of limitation. See *Hernandez v. Caldwell*, 225 F.3d 435 (4<sup>th</sup> Cir. 2000) (prisoners whose cases became final on direct review prior to the AEDPA had until April 24, 1997, to file federal habeas petition under the one-year period of limitation of 28 U.S. C. § 2244(d)(1)); *Brown v. Angelone*, 150 F.3d 370 (4<sup>th</sup> Cir. 1998) (petitioner whose conviction became final on direct review before enactment of the AEDPA had one year after enactment to file federal habeas petition). Because no state petitions had been filed or were pending at the time, Petitioner's statute of limitations for filing a federal habeas petition ran on April 24, 1997. Petitioner's state proceedings begun after that date did not revive the already expired statute of limitations, and no grounds for equitable tolling have been presented. Petitioner's claim is time-barred.

This court notes that Petitioner contends that because there is no direct appeal on a guilty plea, his period of limitations did not begin running until the denial of his motion for discretionary review on April 7, 2004. See Response, p. 1 (docket no. 8). This is simply an incorrect reading of the AEDPA as it applies to state prisoners.

### **III. Conclusion**

In sum, for the foregoing reasons, Respondent is correct that the federal petition here is time-barred. Accordingly, IT IS RECOMMENDED that the motion to dismiss (docket no. 4) be GRANTED for this reason alone without addressing the merits, and that Petitioner's Writ of Habeas Corpus be DENIED.

  
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Wallace W. Dixon  
United States Magistrate Judge

October 26 , 2004